Supreme Court, U.S.
FILED

94-27 JUL 5 1994

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(1)

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1994

COMMONWEALTH,

Respondent,

vs.

MAX EVAN BOWSER,

Petitioner.

# PETITION FOR WRIT OF CERTIORARI TO THE PENNSYLVANIA SUPREME COURT

# PETITION FOR WRIT OF CERTIORARI

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130 pp

## QUESTIONS PRESENTED

1. Whether Petitioner's right to due process of law was violated by the trial court's refusal to permit defense counsel to inform the jury of Pennsylvania's mandatory minimum sentence requirements for homicide by vehicle while driving under the influence of alcohol?

2. Whether the Petitioner's constitutional right to compulsory witnesses and due process of law were violated by the holding of the trial court that the testimony of any character witnesses could be subject to cross-examination by the prosecution regarding Petitioner's prior admission into the Accelerated Rehabilitative Disposition Program where the record of said admission was expunged?

3. Whether Petitioner's constitutional right to confront witness and compulsory process were violated by the actions of the trial court?

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## OPINIONS BELOW

The following Opinions have been rendered by Courts below:

A. The Supreme Court of Pennsylvania, Western District, Per Curiam Order dated March 31, 1994:

> The Court has entered the following Order on your Petition for Allowance of Appeal filed in the above-captioned matter:
>
> **"PER CURIAM:**
> **AND NOW, this 31st day of March, 1994, the Petition for Allowance of Appeal in the above matter is hereby denied.**
> **Mr. Justice Frank J. Montemuro is sitting by designation as Senior Justice pursuant to Judicial Assignment Docket No. 94 R1800, due to the unavailability of Mr. Justice Rolf Larsen, see No. 127 Judicial Administration Docket No. 1, filed October 28, 1993."**

B. Superior Court of Pennsylvania, Pittsburgh District, Judgment dated April 14, 1993:

> J U D G M E N T
>
> ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that Judgment of sentence relating to

conviction for driving while under the influence vacated. In all other respects, judgment of sentence affirmed. Jurisdiction relinquished.

C. Order of the Court of Common Pleas of Fayette County, Pennsylvania, dated April 3, 1992:

**ORDER**

AND NOW, this 3rd day of April, 1992, the defendant's Motion for New Trial and in Arrest of Judgment is DISMISSED and DENIED.

The defendant is directed to appear for the imposition of sentence on Monday, April 27, 1992 at 9:30 a.m. in Courtroom No. 5, Courthouse, Uniontown, Pennsylvania.

D. Sentence of the Court of Common Pleas of Fayette County, Pennsylvania, dated April 27, 1992, at No. 817 1/7 of 1990:

**SENTENCE**

AND NOW, April 27, 1992, the sentence of the Court is that the defendant, Max Evan Bowser, pay the costs of prosecution, pay the sum of $30.00 to the Catastrophic Loss Benefits Continuation Fund, forfeit the sum of $10.00 for Emergency Medical Services, forfeit the sum of $1,000.00 to the Commonwealth of Pennsylvania to be divided $500.00 to Luzerne Township and

$500.00 to the County of Fayette, that he make restitution if any be due and owing, that he undergo imprisonment in a State Correctional Institution for a period of not less than three (3) years nor more than seven (7) years and that his operator's license be suspended for a period of one (1) year. This sentence shall commence and be computed at the expiration of the sentence imposed at number 817 1/2 of 1990 and be consecutive thereto. Upon release from incarceration, the defendant will be required to pay $25.00 per month during the period of his parole for the Offender's Supervision Fee.

E. Sentence of the Court of Common Pleas of Fayette County, Pennsylvania, dated April 27, 1992, at No. 817 2/7 of 1990:

**SENTENCE**

AND NOW, April 27, 1992, the sentence of the Court is that the defendant, Max Evan Bowser, pay the costs of prosecution, pay the sum of $50.00 to the Catastrophic Loss Benefits Continuation Fund, pay the sum of $10.00 for Emergency Medical Services, forfeit the sum of $400.00 to the Commonwealth of Pennsylvania to be divided $200.00 to Luzerne Township and $200.00 to the County of Fayette, that he make restitution if any be due and owing, participate in the Alcohol Safe Driving School and be responsible for the fee for that participation and that the fee be paid to the Fayette County Drug and

Alcohol Abuse Clinic, that he follow any CRN recommendations made by that agency for further drug and alcohol rehabilitation, and that he undergo imprisonment in a State Correctional Institution for a period of not less than one (1) year nor more than two (2) years, and that his operator's license be suspended for a period of one (1) year. This sentence shall commence and be computed from this date.

The Court Constables are directed to deliver the defendant to the Western Diagnostic Classification Center, Pittsburgh, Pa. for compliance with this sentence.

F. Amended Sentence of the Court of Common Pleas of Fayette County, Pennsylvania, dated April 26, 1993, at No. 817 2/7 of 1990:

**AMENDED SENTENCE**

AND NOW, April 26, 1993, the sentence of the Court heretofore entered on April 27, 1992 at this fractional number is amended as follows: The Court will accept the guilty verdict of the jury without further imposition of penalty.

With the exception of this amendment, the sentence of April 27, 1992 shall remain in effect.

## STATEMENT OF GROUNDS ON WHICH JURISDICTION IS INVOKED

Petitioner seeks review of the Order of the Supreme Court of Pennsylvania, Western District, dated March 31, 1994. In that order the Pennsylvania Supreme Court denied Petitioner's Petition for Allowance of Appeal from the Order of the Superior Court of Pennsylvania dated April 14, 1993. That order affirmed the decision of the trial court in denying Petitioner's post-trial motions for relief which motions were filed following the rendering of guilty verdicts on the offenses of homicide by vehicle and homicide by vehicle while driving under the influence pursuant to 75 Pa. C.S.A. Sections 3731 and 3735, as well as driving under the influence and various summary offenses.

The jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. Section 1257(a) and Supreme Court Rule 10, and because Petitioner is seeking review of the

constitutionality of the application of a Pennsylvania statute namely, 75 Pa. C.S.A. Section 3735 and the trial court's rulings in the criminal trial as upheld by the Pennsylvania Court of last resort, namely the Pennsylvania Supreme Court.

## STATUTES INVOLVED

Petitioner is challenging the constitutionality of the rulings and applications of the trial court, namely the Court of Common Pleas of Fayette County, Pennsylvania, as upheld by the Superior Court of Pennsylvania and Supreme Court of Pennsylvania resulting in the violation of his Fifth, Sixth and Fourteenth Amendments rights to remain silent, to a fair jury trial, to due process of law, to confront witnesses and to compulsory witnesses. The constitutions, statutes and regulations involved are as follows:

1. Article V, United States Constitution.

2. Article VI, United States Constitution.

3. Article XIV, Section 1, United States Constitution.

4. Relevant provisions of the Pennsylvania Motor Vehicle Code, as codified at 75 Pa. C.S.A. Section 3731.

5. Relevant provisions of the Pennsylvania Motor Vehicle Code, as codified at 75 Pa. C.S.A. Section 3735.

6. Relevant provisions of the Pennsylvania Crimes Code, 18 Pa. C.S. Section 9122(c).

7. Relevant provisions of the Pennsylvania Rules of Criminal Procedure, Rule 186.

The relevant portions of the above-referenced authorities are set forth at Appendix "H" through "N".

## STATEMENT OF THE CASE

Your Petitioner, Max Evan Bowser, is an adult individual who resides in Fayette County, Pennsylvania. He was arrested on June 10, 1990 and charged with the offenses of driving under the influence of alcohol, homicide by vehicle, homicide by vehicle while driving under the influence and various summary motor vehicle violations. The events giving rise to the criminal complaint occurred on or about May 10, 1990, at approximately 10:05 p.m. on State Route 4022 in Luzerne Township, Fayette County, Pennsylvania.

A motor vehicle accident had occurred at said time and location which resulted in the death of Gina Marie Furlong. The accident was initially investigated by Brownsville Police and shortly thereafter, Officer Donald Eadie of the Luzerne Township Police arrived at the scene and commenced an investigation as well. Mr. Bowser was taken into custody

and arrested on the charges set forth above by Officer Eadie.

A preliminary hearing was held before District Justice Oliver Battaglini on July 16, 1990 at which time a prima facie case was found on all charges and Mr. Bowser was bound over for trial in the Court of Common Pleas of Fayette County. He filed an Omnibus Pre-trial Motion for Relief and a Supplemental Omnibus Pre-trial Motion which motions were denied by Opinion and Order of the Honorable John F. Wagner, Jr. dated February 27, 1991. The matter proceeded to a jury trial which took place from February 3 to February 6, 1992. On said date, the jury returned verdicts of guilty on all charges.

Mr. Bowser thereafter filed timely post-trial motions for new trial and in arrest of judgment raising issues pertaining to certain pre-trial and trial rulings and challenging the guilty verdicts. Following briefing and argument, the Trial Court denied his Motion

for New Trial by Opinion and Order dated April 3, 1992.

Thereafter, your Petitioner was sentenced on April 27, 1992 to serve a 1 to 2 year period of incarceration for the driving under the influence conviction and a 3 to 7 year period of incarceration on the homicide by vehicle while driving under the influence charge. Said sentences are to be served consecutively in accordance with the orders of the court. Mr. Bowser filed a timely Motion to Modify Sentence which was denied on May 11, 1992.

Petitioner thereafter filed a timely appeal to the Superior Court of Pennsylvania. On April 14, 1993, that Court vacated the judgment of sentence relating to the conviction for driving under the influence of alcohol; in all other respects the judgment of the sentence was affirmed and jurisdiction of the case was relinquished to the Court of Common Pleas of Fayette County, Pennsylvania.

On April 26, 1993, the Honorable John F. Wagner, Jr. amended the sentence imposed at No. 817 2/7 of 1990 on the charge of driving under the influence of alcohol and accepted the guilty verdict of the jury without further imposition of penalty.

Mr. Bowser thereafter filed a petition to the Supreme Court of Pennsylvania requesting Allowance of Appeal from the order of the Superior Court. Allowance of appeal was denied by a Per Curiam Order issued on March 31, 1994 and accordingly, your Petitioner has exhausted all of his appeals to the state court of last resort.

The within petition is a request by Mr. Bowser for the issuance of a writ of certiorari to the Pennsylvania Supreme Court in order to review the constitutionality of the rulings of those lower courts. Petitioner has raised the constitutionality of those court's rulings throughout all criminal proceedings, including the omnibus

pretrial motion stage of the case and thereafter preserved those issues by objecting at trial and filing post-trial motions for relief; the issues were again raised before the Superior Court of Pennsylvania and finally, were raised in the Petition for Allowance of Appeal to the Supreme Court of Pennsylvania. That court failed to address the issues as it refused to accept allowance of appeal. Petitioner is now seeking review by this Honorable Court.

## REASONS FOR GRANTING CERTIORARI

Your Petitioner, Max Evan Bowser, respectfully requests that the within writ be granted as the instant case poses important questions concerning the constitutional rights of criminal defendants: 1) where mandatory minimum sentences enacted by the Legislature are being imposed after guilty verdicts are rendered in jury trial

proceedings; 2) the constitutionality of the trial court's ruling that if Mr. Bowser presented character witnesses in his defense, that those witnesses could be cross-examined by the prosecution regarding his previous admission into a Pennsylvania Accelerated Rehabilitative Disposition Program even though the records of said program had been expunged; and 3) the constitutionality of the trial court's ruling permitting the testimony of certain witnesses, including lay witnesses who testified as to the ultimate issue, i.e. whether he operated a motor vehicle while under the influence of alcohol?

**I. The trial court's ruling that Mr. Bowser's counsel would not be permitted to argue the mandatory minimum sentence requirements of Pennsylvania law to the jury violated his constitutional right to due process of law.**

The United States Constitution, Article VI and XIV, protect an individual's right to due process of law, in criminal proceedings.

At trial in the instant case, prior to closing arguments, counsel for Mr. Bowser requested that the court permit him to argue to the jury that, if convicted of Homicide by Vehicle while Driving Under the Influence of alcohol, the court would be required by law to impose a sentence consisting of a minimum mandatory period of incarceration of three (3) years. The Court refused that request, and that refusal constituted a violation of Mr. Bowser's constitutional rights to a fair and impartial jury trial, as well as due process of law under the Sixth and Fourteenth Amendments of the United States Constitution.

75 Pa. C.S.A. Section 3735, Homicide By Vehicle While Driving Under Influence, provides, inter alia, as follows:

> "a. Offense Defined - Any person who unintentionally causes the death of another person as the direct result of a violation of Section 3731 (relating to driving under influence of alcohol or controlled substance) and who is convicted of violating Section 3731 is guilty of a felony of the third degree when

> the violation is the cause of death and the sentencing court shall order the person to serve a minimum term of imprisonment of not less than three (3) years." (Emphasis added).

The effect of this provision is to remove all discretion in sentencing matters from the trial judge and in effect place the sentencing authority within the province of the jury. Since the jury's verdict of guilty or not guilty will determine the sentence imposed upon the defendant, they should be made aware of the implications of their decision so that they can reach that determination with appropriate knowledge and information. The trial court's refusal to permit defense counsel to set out that information in his closing argument to them violates the defendant's right to a fair trial.

The trial court, in ruling upon Mr. Bowser's post-trial motions, merely held that "punishment is a matter solely for the court

and not for the jury to know or to consider during its deliberations." (Slip. Op. 19, RR. 629a) (citations omitted). Similarly, the Superior Court merely held that ". . .as the question of punishment is one left to the court and may not be considered by jurors during the course of deliberations, see Commonwealth v. Waters, 334 Pa. Super. 513, 483 A.2d 855 (1984), we find that appellant's assertion of error entitles him to no relief." Slip. Op. pp. 21-22, Appendix C, pp. 34-35. These holdings are inconsistent with the trial court's refusal to permit counsel's proposed argument, because in matters involving mandatory sentencing, the punishment is no longer solely within the province of the court, but has been mandated by the Legislature and placed in the hands of the jury by virtue of their determination of guilt. Accordingly, it should properly be a matter put before the jury so that they can be aware of the implications of their

determination.

Moreover, the true spirit of the Sixth Amendment is violated where the jury is deprived of the information regarding imposition of mandatory minimum sentences of incarceration because, while a defendant who chooses a non-jury trial by a judge, receives the benefit, (whether intentional or not) of a fact finder who knows the legal requirements for sentencing, the criminal defendant who exercises his right to a jury trial does not receive such a benefit. Even though the judge does not consider the mandatory minimum sentencing requirements in rendering his verdict, a jury should at the very least be given the same information when rendering its decision as the non-jury fact finder has within its possession. To deprive them of that information violates the defendant's constitutional right to due process of law, as well as the spirit of the constitutional right to a jury trial.

**II. Petitioner's right to compulsory witness and to due process of law was violated by the trial court's holding that testimony of defense character witness could be subject to Commonwealth cross examination regarding his previous admission into the Accelerated Rehabilitative Disposition Program.**

The United States Constitution, Article VI, provides as follows:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the assistance of counsel for his defense.

It has been held that the Sixth Amendment right to compulsory witnesses embraces the right to have those witnesses testify. U.S. v. Melchor Marano, 536 F.2d 1042 (C.A. TX 1976). Mr. Bowser's right to compulsory witnesses was violated when the trial court held that, if he presented

character witnesses on his behalf, the Commonwealth would be permitted to cross-examine those witnesses regarding his admission into the Pennsylvania Accelerated Rehabilitative Disposition Program following a prior arrest for driving while under the influence. This permission would have been allowed, even though the admission into the ARD program was expunged.[1] Accordingly, Mr. Bowser did not present evidence regarding his reputation in the community as a moral and law abidding citizen and he was therefore denied his right to compulsory witnesses. The expunged record of admission into the Accelerated Rehabilitative Disposition Program, which occurred twelve (12) years prior to the case giving rise to the instant criminal charges, could not have been used

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[1]The Accelerated Rehabilitative Disposition Program is a program for first time offenders which, upon successful completion, provides for the expungement of the criminal record. 75 Pa. C.S.A. Section 3731 and Pa. Rules of Criminal Procedure 175 et seq.

against Mr. Bowser in and of itself pursuant to Pennsylvania Rule of Criminal Procedure 186, and 18 Pa. C.S.A. Section 9122. The trial court's ruling, as affirmed by the Pennsylvania courts of last resort, that the Commonwealth could inject that issue into evidence by cross-examining Mr. Bowser's character witnesses is clearly improper.

The Pennsylvania courts' refusal to permit him to call those witnesses without the threat that the Commonwealth would cross-examine them regarding an expunged criminal record, violated his rights to due process of law and to compulsory witnesses and a fair jury trial under the United States Constitution. Petitioner is requesting that this Court review this important issue so that this violation can be corrected.

## III. Petitioner's constitutional right to confront witness and compulsory process were violated by the actions of the trial court.

Finally, your Petitioner asks that this Honorable Court review the Pennsylvania Court rulings at trial which resulted in his conviction in the instant matter.

Defense counsel at the time of trial, objected to the testimony of Commonwealth lay witness, David Watters, who gave lay opinions regarding his ability to travel around the curve where the accident occurred at a speed of 60 miles per hour, and regarding his opinion as to Mr. Bowser's alleged intoxication. The Commonwealth neither laid a proper foundation for the testimony, nor otherwise established that Mr. Watters was capable of giving opinions regarding these matters; therefore the introduction of the testimony into evidence deprived Mr. Bowser of his right to confront witnesses.

This constitutional violation is

particularly prejudicial since Pennsylvania Courts have held that lay testimony may not be given with regard to the ultimate issue in a case. See, Packel/ Poulin, Pennsylvania Evidence, Vol. 1, Section 701, p. 503, citing Starner v. Wirth, 44 Pa. 177, 269 A.2d 674 (1970). Since Mr. Watters' opinion that Mr. Bowser was intoxicated clearly goes to the ultimate issue of whether he was Driving Under the Influence of Alcohol or committed Homicide by Vehicle while DUI, that lay testimony should not have been permitted.

Your Petitioner further submits that his rights were violated when the trial court overruled objection to the cumulative testimony of witnesses Dearth, Townsend and Ballon. Each of those witnesses testified as to their opinion that Mr. Bowser had an odor of alcohol on his breath, all of which is repetitive, cumulative and prejudicial and therefore should have been deemed inadmissible.

Mr. Bowser's right to confront witnesses was further violated when it allowed the testimony of Trooper Brian Burden regarding his opinion that Mr. Bowser was intoxicated. Trooper Burden did not observe Mr. Bowser until more than two (2) hours after the occurrence of the accident and said observation occurred at the Belle Vernon State Police Barracks while Mr. Bowser was suffering from his injuries as a result of the accident. (N.T. 2-4-92 at 62-63, RR. 375a-376a). Trooper Burden did not administer a field sobriety test or otherwise conduct an examination of Petitioner to determine whether he was intoxicated at the time he operated the motor vehicle nor did he observe Mr. Bowser in actual physical control of the vehicle. Therefore, his testimony regarding an opinion that Mr. Bowser was intoxicated while driving was improper and without foundation, depriving Mr. Bowser of the ability to properly cross examine and

prejudicing the jury.

The Commonwealth presented the testimony of Trooper Beverly Ashton regarding her reconstruction of the accident and accident scene. The admission of this testimony, over defense counsel's objection, similarly violated Petitioner's right to confront witnesses and obtain a fair trial as Trooper Ashton was neither qualified to conduct the reconstruction, nor was she testifying from her own knowledge, as her testimony was based upon hearsay and was otherwise improper. The testimony revealed that Trooper Ashton received no specialized training other than a training course and did not possess engineering or other specialized degrees which would qualify her for the reconstruction of accidents. (N.T. 2-4-92 at 71-73, RR. 384a-386a). Similarly, she was not qualified and no foundation was laid for her testimony regarding the use of the drag sled and her opinion based upon same should

not have been permitted to reach the jury.

Trooper Ashton admitted that her testimony was based at least in part upon hearsay information, as she conducted the reconstruction based upon the size and weight of vehicles other than those involved in the accident. (N.T. 21-4-92 at 95-96, RR. 408a-409a). Since she received that information from third parties, it was clearly hearsay, as noted by the Superior Court (Slip Op. of 4/14/93 at p. 18). That Court's holding that the trooper could "reasonably rely" on the information violated Mr. Bowser's rights since, no foundation was laid to establish that the hearsay information was applicable to the specific circumstances of this case. Accordingly, the failure of the Commonwealth to present a witness to testify as to the actual size and weight of the vehicles involved in the accident renders Trooper Ashton's opinion improper and without foundation.

Mr. Bowser also challenged the Commonwealth's intended use of his alleged refusal to undergo blood and breath alcohol tests in both the Omnibus Pre-Trial Motion and at trial. The Trial Court denied Mr. Bowser's Motion for Suppression and overruled his trial objection in both instances. These rulings were in error. Over defense counsel's objection at trial, the Commonwealth introduced into evidence the testimony of police officer Donald Eadie pertaining to Mr. Bowser's alleged refusal to undergo a blood alcohol content test at Brownsville Hospital. (N.T. 2-3-92 at 12, RR.325a).

The accident occurred at approximately 10:25 p.m. and the request for the Defendant to submit to a breath test was made more than two (2) hours after the accident. (N.T. 2-4-92 at 63, RR.376a). A request for a blood test at Brownsville Hospital did not occur until after the Appellant was taken from the Belle Vernon Barracks, more than two and one-

half hours after the accident. (N.T. 2-4-92 at 14, RR. 327a).

The Pennsylvania Supreme Court, in Commonwealth v. Modoffare, 529 Pa. 101, 601 A.2d 1233 (1992),[2] had recently suppressed the results of blood alcohol tests taken approximately one (1) hour after the accident because of the lapse of time involved. In the instant case, even if Mr. Bowser had undergone the blood test, due to the length of time between the accident and his appearance at the hospital, as well as the fact that there was no testimony at trial pertaining to the time of alleged drinking, the results of those tests would have been inadmissible in any event. Therefore, Mr. Bowser's alleged refusal to undergo the tests should have been inadmissible, because the

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[2]The Pennsylvania Legislature amended the relevant provisions of the Motor Vehicle Code after the Modoffare case was issued, to permit the use of samples collected within a reasonable time of operating the motor vehicle. 75 Pa. C.S.A. Section 3731(a)(5)(ii).

Commonwealth would have been unable to introduce the results of same at trial.

The Superior Court addressed the Modoffare case in its decision by holding that, "as that case contains no discussion of matters affecting the suppressability of blood test results, appellant's claim of error must fail" (Slip Op. of 4/14/93 at No. 725 Pgh. 1992, at p. 10). Similarly, the Trial Court held that, "we do not believe that case stands for the proposition suggested by defense counsel." (Slip Op., p. 8, RR. 618a). However, both lower courts missed the point of the Modoffare decision. The issue should not center merely around the establishment of the blood alcohol content, but around the defendant's due process rights which are applicable at the administration of said tests.

The unconstitutionality of these holdings is particularly acute in light of the serious nature of the injuries and

damages sustained by Mr. Bowser. The medical evidence presented at trial clearly reflected that Mr. Bowser suffered a fractured ri[illegible] (N.T. 2-4-92 at 120, RR. 433a); accordingly, said injuries prevented him from producing enough breath to perform the test. Trooper Burden's testimony that he interpreted Mr. Bowser's inability to produce breath as a refusal (N.T. 2-4-92 at 57, RR. 370a) resulted in a violation of his Fifth Amendment right against self-incrimination as that testimony should not have been permitted to go to the jury.

Even assuming, arguendo, that Mr. Bowser did in fact "refuse" to undergo the blood and breath alcohol content tests, neither refusal was made in a knowing, voluntary or intelligent fashion. To the contrary, he was not properly advised of his Miranda rights and in fact was seated in the back of a police car at the time the rights were read to him, suffering from his injuries. (N.T.

Preliminary Hearing 7-16-90 at 38, RR. 90a). Petitioner is requesting that this Court review this violation of his Fifth Amendment right to remain silent.

Further, the trial court violated Mr. Bowser's Fifth Amendment right to remain silent when it refused to instruct the jury in accordance with Petitioner's Suggested Point for Charge number 15, which was a request for an instruction that a refusal to take a breath test may not be used against the defendant at trial. The court held that its use Pennsylvania Suggested Standard Criminal Jury Instruction 17.1547A,[3] permits

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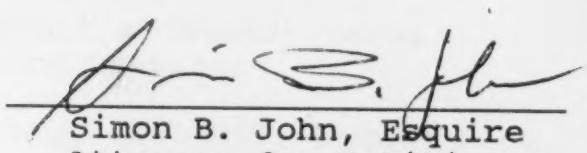
[3]The trial court's instruction was as follows: "If you believe that the defendant was asked and refused to give a sample of his breath or blood for testing, you may consider that fact, along with all the other relevant evidence, when you are deciding whether the defendant was under the influence of alcohol. Give the defendant's refusal whatever weight and meaning you think it deserves. The other relevant evidence includes the circumstances surrounding the request, or the sample, and the defendant's refusal and any reasons the defendant gave for refusing. A person can refuse to give a sample by words or conduct and a refusal is anything short of an unqualified consent." N.T. 220, RR 533a.

the Commonwealth to argue that a refusal may indicate a consciousness of guilt. This holding was in error, because the Court's underlying finding of a "refusal" violated Mr. Bowser's constitutional rights.

## CONCLUSION

Your Petitioner, Max Evan Bowser, respectfully submits that in light of the cases and arguments hereinabove set forth the within Writ of Certiorari presents important questions concerning the constitutional rights afforded to defendants in criminal proceedings in the Commonwealth of Pennsylvania and accordingly he requests that this Honorable Court review the instant matter.

Respectfully submitted,



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DATED: July 1, 1994

**APPENDIX "A"**

**The Supreme Court of Pennsylvania**
**Western District**

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April 4, 1994

Simon B. John, Esquire
96 East Main Street
Uniontown, PA 15401

In Re: Commonwealth of Pennsylvania v. Max Evan Bowser, Petitioner
No. 0223 W.D. Allocatur Dkt. 1993

Dear Mr. John,

The Court has entered the following Order on your Petition for Allowance of Appeal filed in the above-captioned matter:

**"PER CURIAM:**

**AND NOW, this 31st day of March, 1994, the Petition for Allowance of Appeal in the above matter is hereby denied.**

**Mr. Justice Frank J. Montemuro is sitting by designation as Senior Justice pursuant to Judicial Assignment Docket No. 94 R1800, due to the unavailability of Mr. Justice Rolf Larsen, see No. 127 Judicial Administration Docket No. 1, filed October 28, 1993."**

Very truly yours,
/s/ Irma T. Gardner
Deputy Prothonotary

ITG:llb
cc: Ralph C. Warman, Esquire
District Attorney
Hon. John F. Wagner, Jr.

**APPENDIX " B "**

SUPERIOR COURT OF PENNSYLVANIA
PITTSBURGH DISTRICT

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| COMMONWEALTH OF PENNA. | : | |
| | : | |
| V. | : | NO. 725 PITTS. 1992 |
| MAX EVAN BOWSER, | : | |
| Appellant. | : | |

J U D G M E N T

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that Judgment of sentence relating to conviction for driving while under the influence vacated. In all other respects, judgment of sentence affirmed. Jurisdiction relinquished.

BY THE COURT:

/s/Eleanor R. Valecko
Deputy Prothonotary

DATED: April 14, 1993

**APPENDIX "C"**

J.A50028/92

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| COMMONWEALTH OF PENNA. | : | IN THE SUPERIOR COURT |
| | : | OF PENNSYLVANIA |
| | : | |
| v. | : | |
| | : | |
| MAX EVAN BOWSER, | : | |
| | : | |
| Appellant. | : | No. 00725 Pitts. 1992 |

Appeal from the Judgment of Sentence Entered April 27, 1992, in the Court of Common Pleas of Fayette County, Criminal Division, at No. 817 of 1990.

BEFORE: ROWLEY, P.J. and JOHNSON and HESTER, JJ.

OPINION BY HESTER, J.: Filed: April 14, 1993

Max Evan Bowser appeals from the judgment of sentence entered in the Court of Common Pleas of Fayette County on April 27, 1992, after jury convicted him of numerous offenses in connection with an automobile accident involving a fatality. Appellant was sentenced to an aggregate term of imprisonment of four to nine years, ordered to attend alcohol-safe driving school, directed to make restitution, and commanded

to pay various fines and costs.[1] In this timely appeal, he contends that the trial court erroneously declined to suppress evidence pertaining to his refusal to submit to blood and breath tests following the accident. In addition, appellant asserts that the court incorrectly rejected his request for a change of venue, refused him permission to inform the jury of the potential applicability of a mandatory minimum sentencing provision, and denied certain points for charge. Appellant also raises several challenges to the sufficiency of the evidence and questions the propriety of both his sentence and various evidentiary rulings. For the reasons set forth below, we partially vacate the judgment of sentence.

The procedural history of this case may be summarized as follows. On June 8, 1990,

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[1]In addition, his driver's license was suspended for a period of one year.

approximately two months after his initial arrest in connection with a two-vehicle accident involving a fatality, appellant was re-arrested and charged with homicide by vehicle, driving while under the influence, and homicide by vehicle while driving under the influence. He also was charged with various summary offenses, including reckless driving, driving at an unsafe speed, driving on the right side of the roadway, and meeting vehicles proceeding in the opposite direction.

In the months following his second arrest, appellant filed both pretrial and supplemental pretrial motions in an effort to obtain, inter alia, the suppression of evidence pertaining to his refusal to submit to tests utilized for the determination of blood alcohol content. On February 27, 1991, the trial court denied appellant's requests for relief. Two months later, appellant sought permission to file nunc pro tunc an

omnibus pretrial motion requesting a change of venue. The court subsequently denied the requested permission without prejudice to appellant's right to challenge venue during voir dire.

On February 3, 1992, following the examination of a pool of potential jurors, appellant orally moved for a change of venue. The trial court denied that motion, and a jury was empaneled. Three days later, the jury convicted appellant of the various charged offenses. Appellant subsequently filed unsuccessful post-verdict motions, and the trial court imposed the described sentence. This appeal followed the denial of appellant's motion to modify sentence.

We first consider appellant's challenges to the sufficiency of the evidence. These challenges, which relate to his convictions for homicide by vehicle, driving while under the influence, and homicide by vehicle while driving under the influence, are devoid of

merit. Commonwealth v. Hardcastle, 519 Pa. 236, 246, 546 A.2d 1101, 1105 (1988), our Supreme Court discussed the well-established test utilized for determining the sufficiency of the evidence and stated:

> The test for determining the sufficiency of the evidence is whether, viewing the evidence in the light most favorable to the Commonwealth as verdict winner and drawing all proper inferences favorable to the Commonwealth, the [fact-finder] could reasonably have determined all elements of the crime to have been established beyond a reasonable doubt. Commonwealth v. Syre, 507 Pa. 299, 489 A.2d 1340 (1985). This standard is equally applicable to cases where the evidence is circumstantial rather than direct so long as the combination of the evidence links the accused to the crime beyond a reasonable doubt. Commonwealth v. Sullivan, 472 Pa. 129, 150, 371 A.2d 468, 478 (1977); Commonwealth v. Farquharson, 467 Pa. 50, 354 A.2d 545 (1976); Commonwealth v. Cox, 466 Pa. 582, 353 A.2d 844 (1976).

See also Commonwealth v. Cox, 376 Pa. Super. 416, 546 A.2d 96 (1988). Accordingly, we must examine the evidence and determine whether it is sufficient to support the convictions in question. Our review of the

record reveals the following facts.

On the evening of May 10, 1990, a vehicle containing appellant rounded a blind curve on Alicia Road in Luzerne Township. This vehicle, which was proceeding between thirteen and thirty-nine miles per hour over the posted speed limit, crossed a double-yellow line and collided head-on with an automobile operated by Gina Marie Furlong. During the course of this collision, Ms. Furlong suffered injuries which resulted in her death.

Shortly after the accident, David Waters arrived on the scene. He subsequently removed Ms. Furlong from her burning automobile and placed her in the back of his truck. Mr. Waters then proceeded to appellant's vehicle and attempted to remove him from the wreckage. However, appellant, who was clutching the steering wheel, became belligerent. Mr. Waters eventually utilized force to remove appellant from the vehicle.

Mr. Waters, who opined at trial that appellant was intoxicated, then walked him to the side of the road.

Following the arrival of Chief Donald Eadie of the Luzerne Township Police Department, Mr. Waters identified appellant as one of the two drivers involved in the accident. Chief Eadie, who noticed that an odor of alcohol emanated from appellant, requested him to perform several field sobriety tests. After appellant completed the filed sobriety tests, Chief Eadie arrested him. He then advised appellant of the implied consent law and asked him if he would consent to a breathalyzer test. As appellant replied in the affirmative, Chief Eadie drove him to the Belle Vernon State Police Barracks, where Trooper Brian Burden explained both the implied consent law and the nature of the breathalyzer test. A short while later, Trooper Burden administered the test. However, since appellant failed to

provide a sufficient breath sample, the trooper discontinued the test and treated appellant's actions as a refusal of consent. Thereafter, Chief Eadie drove appellant to Brownsville General Hospital, where he refused to submit to a blood alcohol test.

The crime of homicide by vehicle requires the Commonwealth to prove:

> that (1) the Appellant drove in a manner that violated the Motor Vehicle Code, (2) the Appellant knew or should have known that his conduct violated the law and (3) the death was the probable result of the Motor Vehicle Code violation. Commonwealth v. Uhrinek, 518 Pa. 532, 544 A.2d 947 (1988); See also In the Interest of Hyduke, 371 Pa. Super. 380, 538 A.2d 66 (1988).

Matter of Huff, 399 Pa. Super. 574, 582, 582 A.2d 1093, 1097 (1990), aff'd, 329 Pa. 442, 604 A.2d 1026 (1992). In addition, we note that the Commonwealth is required to establish that the violation of the Motor Vehicle Code amounted to a gross deviation from the standard of care that a reasonable person would observe under the circumstances.

See Commonwealth v. Heck, 517 Pa. 192, 535 A.2d 575 (1987).

In the present case, the facts demonstrate that appellant violated 75 Pa. C.S. Section 3301, which relates to driving on the right side of the roadway, by driving his vehicle across double-yellow lines and on to the portion of the roadway reserved for on-coming traffic. In addition, we note that appellant unquestionably should have known that his conduct, which resulted in the death of Ms. Furlong, violated the law since it contravened one of the most basic principles relative to the operation of motor vehicles. Moreover, we believe that the act of crossing a double-yellow line when rounding a blind curve grossly deviates from the standard of care that a reasonable person would observe under the circumstances as it involves an easily discernible risk that a fatal collision may result. Accordingly, we conclude that the evidence presented by the

Commonwealth is sufficient to support appellant's conviction for homicide by vehicle.

We now address the crimes of driving while under the influence and homicide by vehicle while driving under the influence. With respect to those offenses, appellant asserts that the evidence presented at trial is insufficient to support a determination of guilt since it fails to establish that he operated one of the vehicles while intoxicated. However, our review of the facts demonstrates that appellant was discovered clutching the steering wheel of one of the vehicles following the accident and that Mr. Waters believed him to be intoxicated. Clearly, these facts are sufficient to support a determination regarding the operation of a motor vehicle while intoxicated.

Appellant also claims that the trial court erroneously declined to suppress

evidence pertaining to his refusal to submit to tests utilized for the determination of blood alcohol content.

> In reviewing such a claim, we must consider only the evidence of the prosecution's witnesses and so much of the evidence for the defense as, fairly read in the context of the record as a whole, remains uncontradicted. Commonwealth v. Kichline, 468 Pa. 265, 280-81, 361 A.2d 282, 290 (1976). If the record supports the factual findings of the suppression court, as well as the legitimacy of the inferences and legal conclusions drawn from those findings, they may not be disturbed on appeal. Commonwealth v. O'Bryant, 479 Pa. 534, 537, 388 A.2d 1059, 1061, cert. denied, 439 U.S. 990, 99 S.Ct. 589, 58 L.Ed.2d 664 (1978). "It is, however, exclusively the province of the suppression court to determine the credibility of the witnesses and the weight to be accorded to their testimony." Commonwealth v. Neely, 298 Pa. Super. 328, 341, 444 A.2d 1199, 1205 (1982).

Commonwealth v. Mason, ____ Pa. Super. ____, ___, 608 A.2d 506, 507 (1992). Keeping these principles in mind, we must examine the facts adduced during the course of the suppression hearing, consider the various assertions relied upon by appellant in support of

suppression, and determine whether the trial court properly refused the requested relief. Our examination of the evidence adduced at the suppression hearing reveals the following facts.

On the evening of May 10, 1990, Chief Donald Eadie of the Luzerne Township Police Department arrived on the scene of an automobile accident, noted the presence of officers of the Brownsville Police Department, and observed one of the two damaged Fords engulfed in flames. After conducting a brief investigation, Chief Eadie entered a Brownsville Police cruiser containing appellant and asked him a few questions. In response, appellant indicated that he was uninjured and asserted that he had not been the operator of or a passenger in either of the vehicles in question. Immediately thereafter, David Waters, the first person to arrive at the accident site, contradicted appellant by identifying him as

one of the drivers that he pulled from the wreckage.

Following Mr. Water's identification, Chief Eadie, who noticed that appellant smelled of alcohol and had bloodshot eyes and slurred speech, asked him to perform some field sobriety tests. Appellant consented and performed several tests. After staggering during a ten-pace walk, appellant was taken into custody and informed of Pennsylvania's implied consent law. As he drove appellant to the Belle Vernon State Police Barracks, Chief Eadie advised him of his Miranda rights and indicated that those rights had no applicability to the administration of a breathalyzer test.

Shortly after appellant and Chief Eadie arrived at the state police barracks, Trooper Brian Burden advised appellant of Pennsylvania's implied consent law. Appellant, who indicated that his leg hurt, subsequently consented to take a breathalyzer

test.[2] However, when Trooper Burden administered the test, appellant failed to provide an adequate breath sample. Accordingly, the trooper discontinued the test and treated appellant's actions as equivalent to a refusal of consent. Later, Chief Eadie drove appellant to Brownsville General Hospital. While at the hospital, appellant declined to provide a blood sample for purposes of blood alcohol testing.

Appellant, relying upon evidence indicated that he suffered a broken rib in the accident, asserts that the trial court improperly failed to suppress testimony pertaining to his refusal to submit to the breathalyzer test since he physically was incapable of producing the necessary breath

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[2]We note that appellant adduced testimony at the suppression hearing which established that he suffered both a broken ankle and a broken rib in the accident. However, an examination of the record demonstrates that it is devoid of evidence indicating that he complained of pain emanating from the rib injury either prior to or contemporaneously with the administration of the breathalyzer test.

sample. Even if we assumed the truthfulness of the medical evidence relied upon by appellant, we would find his claim devoid of merit. Although the evidence in question establishes that he suffered a broken rib, it fails to demonstrate that this injury hindered his ability to produce the breath sample necessary for the completion of the breathalyzer test. Consequently, the evidence fails to support appellant's claim of a causal nexus between his injury and the refusal.

Appellant next asserts that the trial court improperly failed to suppress evidence pertaining to his refusal to submit to a blood alcohol test at Brownsville General Hospital since the results of such a test would have been inadmissible under Commonwealth v. Modaffare, 529 Pa. 101, 601 A.2d 1233 (1992). However, our examination of Modaffare reveals that it disposed of a single sufficiency issue relating to the

establishment of the blood alcohol content necessary to support a conviction for driving while under the influence.[3] Thus, as that case contains no discussion of matters affecting the suppressibility of blood test results, appellant's claim of error must fail.

Appellant also asserts that the trial court erroneously neglected to suppress evidence relating to the two previously discussed refusals because he was not properly advised of his Miranda rights before being asked to submit to alcohol content tests. Even if we assumed that the warnings in question were not properly given,

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[3]Specifically, the Supreme Court of Pennsylvania held in Modaffare that evidence of a blood alcohol test taken nearly two hours after an accident was insufficient to support a conviction for operating an automobile while possessing a blood alcohol content either equal to or exceeding 0.10%. In support of this conclusion, the Court relied upon the lapse of time between the accident and the test, the slight amount by which the test result exceeded the requisite level, and expert testimony adduced by the Commonwealth which indicated that defendant's blood alcohol content may have been below 0.10% level at the time of the accident.

appellant's assertion would fail. It is clear that persons arrested for operating motor vehicles while under the influence of alcohol need not be given Miranda warnings before being asked to submit to testing for blood alcohol content. Indeed, we note that in cases where Miranda warnings actually are given, the police have an affirmative duty to inform the arrestee that he has no right to counsel in connection with such testing. See Commonwealth v. Danforth, ___ Pa. ___, 608 A.2d 1044 (1992).

We now consider appellant's challenge to the denial of his request for a change of venue due to pretrial publicity. Our standard for reviewing such a challenge is well-established.

> The grant or refusal of a change of venue is within the sound discretion of the trial court, which is in the best position to assess the community feeling, and it will not be disturbed absent an abuse of discretion. Commonwealth v. Tedford, 523 Pa. 305, ___, 567 A.2d 610, 618 (1989); Commonwealth v. Buehl, 361 A.2d 282,

287 (1975), the supreme court stated that "[i]n reviewing the trial court's decision, the only legitimate inquiry is whether any juror formed a fixed opinion of appellant's guilt or innocence as a result of the pre-trial publicity." In Commonwealth v. Casper, 481 Pa. 143, 151-52, 392 A.2d 287, 291-92 (1978), the court stated, "It is clear that the mere existence of pre-trial publicity does not warrant a presumption of prejudice. Similarly, a possibility that the prospective jurors will have formed an opinion based on news accounts will not suffice." Nevertheless, there are times when pretrial publicity is so pervasive and inflammatory that the accused is relieved of establishing actual juror prejudice.

> Pre-trial prejudice is presumed is: (1) the publicity is sensational, inflammatory, and slanted toward a conviction rather than factual and objective; (2) the publicity reveals the accused's prior record, if any, or if it refers to confessions, admissions or reenactments of the crime by the accused; and (3) the publicity is derived from police and prosecuting officer report.

Commonwealth v. Pursell, 508 A.2d 212, 221, 495 A.2d 183, 187 (1985) (emphasis added).

Commonwealth v Patterson, 392 Pa. Super. 331, 349-50, 572 A.2d 1258, 1268 (1990). In the present case, our examination of the record reveals that the alleged pretrial publicity, which consisted of several newspaper articles, was not included in the record. Accordingly, we find that appellant's challenge to the denial of his venue request has been waived. See Commonwealth v. Patterson, supra. Moreover, we note that even if the challenge were reviewable, we would find it devoid of merit.

Our review of the appellant's argument reveals no claim of actual prejudice regarding the various empaneled jurors. Thus, resolution of the issue posed by appellant depends upon whether we may presume the existence of pretrial prejudice stemming from the challenged publicity, which ended approximately ten months after the accident. Even if we assumed that the publicity in question met the standard for the presumption

of pretrial prejudice, appellant's claims would fail. Since appellant's trial did not begin until February 3, 1992, eleven months after the last of the contested publicity had been disseminated, we conclude that any potential prejudice had dissipated by the time that proceeding began. See Commonwealth v. Kichline, supra. (six months is sufficient "cooling down" period after prejudicial pretrial publicity); Commonwealth v. Galloway, 495 Pa. 535, 434 A.2d 1220 (1981) (five and one-half month time period sufficient for prejudice to dissipate).

Appellant also challenges the propriety of several evidentiary rulings made by the trial court. Keeping in mind that "[m]atters relating to the admissibility of evidence are controlled by the trial court's discretion and [that] an appellate court will not reverse the trial court's ruling absent a clear abuse of discretion[,]" Commonwealth v. Cody, 401 Pa. Super. 85, 90, 584 A.2d 992,

994 (1991), we consider the merits of appellant's claims.

Appellant asserts that the trial court improperly permitted David Waters, a lay person, to testify that he has driven around a curve at the accident site at sixty miles per hour. In support of this assertion, appellant contends that the Commonwealth laid no foundation for opinion testimony on the issue of speed.[4] This claim is devoid of merit. As the contested testimony merely recounted the factual matter of how fast Mr. Waters has driven around the curve, it clearly did not constitute opinion testimony and thus, required no foundation for its admission.

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[4]We note that appellant's brief indicates that Mr. Waters testified "that he could drive around the curve at the scene of the accident at a speed of 60 miles per hour." Appellant's brief at 22. This characterization of Mr. Water's testimony is not entirely accurate. Our review of the record reveals that Mr. Waters mentioned that he, on various occasions, has taken the curve at sixty miles per hour. Notes of Testimony ("N.T."), 2/3/92, at 32.

Appellant also asserts that the trial court erroneously permitted Mr. Waters to opine that appellant was intoxicated on the evening of the accident. In support of this assertion, which we find devoid of merit, he contends that the contested opinion improperly embraced an ultimate issue in the case and was not supported by the requisite foundation.

> Intoxication is a matter of common knowledge, and opinions given by lay people are permissible on the issue. Commonwealth v. Reynolds, 256 Pa.Super. 259, 389 A.2d 1113 (1978). However, the lay witness must have sufficient facts on which to base his opinion before he can express an opinion on another's intoxication. Commonwealth v. Hughes, 480 Pa. 311, 389 A.2d 1081 (1978). See also Commonwealth v. Summers, 269 Pa.Super. 437, 410 A.2d 336 (1979) (court concludes witness' observations of the way the person looked and the way he was walking provided sufficient factual basis for witness to conclude a person was intoxicated). The court also looks to the witness' personal knowledge and observation. Commonwealth v. Davenport, 255 Pa. 131, 386 A.2d 543 (1978).

Commonwealth v. Womack, 307 Pa.Super. 396,

408, 453 A.2d 642, 648 (1982). In addition, we note that lay opinion testimony embracing an ultimate issue in a case is admissible as long as the witness perceived the events upon which his opinion is based. See Commonwealth v. Neiswonger, 338 Pa.Super. 625, 488 A.2d 68 (1985).

In the present case, Mr. Waters, the first person to arrive at the scene of the accident, testified that he observed appellant sitting in the driver's seat of his automobile clutching the steering wheel. In addition, Mr. Waters indicated that appellant's automobile was close in proximity to one engulfed in flames, that a strong odor of alcohol emanated from appellant, that appellant responded with belligerence to attempts to remove him from the vehicle, and that the utilization of force was necessary to accomplish that task. Finally, Mr. Waters testified that he previously had observed intoxicated individuals.

Based upon Mr. Water's prior experience with intoxicated individuals and his testimony regarding both the smell of alcohol and appellant's actions, the trial court correctly could have concluded that the contested opinion had a sufficient factual basis. Moreover, as that opinion clearly was based upon Mr. Water's personal observations, it properly could embrace an ultimate issue of fact. Thus, as we find that the trial court committed no abuse of discretion in admitting the opinion testimony in question, appellant's claim of error must fail.

Appellant next asserts that the trial court improperly permitted Pennsylvania State Trooper brian Burden to opine that appellant was intoxicated at the time of the accident. This assertion is unsupported by the record and accordingly, must fail.

Our examination of the record reveals that the Commonwealth made no specific request for the trooper's opinion regarding

appellant's state of sobriety at the time that he was engaged in the operation of his motor vehicle. Rather, it establishes that the Commonwealth generically asked the trooper to utilize both his experience and personal observations to render an opinion as to whether appellant was intoxicated. N.T., 2/4-6/92, at 60. Since the Commonwealth's generic request was made after much testimony had been adduced regarding matters occurring at the Belle Vernon State Police Barracks, it is clear that the opinion requested related to the time in which appellant was in that facility. Thus, we find that the trooper's response, which also is generic, embraces that time period.

Appellant asserts that the trial court erroneously permitted the Commonwealth to elicit expert testimony from Pennsylvania State Trooper Beverly Ashton regarding her reconstruction of the accident. In support of his assertion, appellant contends that

Trooper Ashton lacked the background necessary to qualify her as an expert in field of accident reconstruction and alleges that her opinions were based upon hearsay information. We initially address the qualification aspect of appellant's assertion.

In Commonwealth v. Pearsall, 368 Pa.Super. 327, 332, 534 A.2d 106, 109 (1987), overruled on other grounds, Commonwealth v. Garcia, 403 Pa.Super. 280, 588 A.2d 951 (1991) (en banc), we considered the propriety of a trial court's decision to permit certain expert testimony and stated:

> To qualify as an expert witness, a witness need only have a "reasonable pretension to specialized knowledge," on a subject for which expert testimony is admissible. Commonwealth v. Washington, 235 Pa.Super. 339, 340 A.2d 896 (1975). An expert's pretension to specialized knowledge may be based upon practical, occupational, or other experiential training; the expert need not have gained expertise through academic training. Commonwealth v. Ellis, 354 Pa.Super. 11, 510 A.2d 1253 (1986); Commonwealth v. Daniels, 280 Pa.Super. 278, 421 A.2d 721 (1980).

Utilizing these principles, we must examine the record and determine whether Trooper Ashton possessed sufficient knowledge of the field of accident reconstruction to qualify her as an expert.

During the course of voir dire, Trooper Ashton indicated that she received basic training in accident investigation after joining the Pennsylvania State Police. The trooper also testified that she received advanced training in that subject and was assigned to various areas in western Pennsylvania as a member of the traffic unit, which enforces the motor vehicle laws and investigates accidents. In addition, Trooper Ashton stated that she attended an accident reconstruction course offered by the Pennsylvania Department of Education, completed a course dealing with special problems in accident reconstruction, and performed six full reconstructions. Finally, she indicated that she is a member of the

National Association of Professional Accident Reconstruction Specialists.

Although the record contains no testimony indicating that Trooper Ashton possessed an engineering degree, we believe that the trial court properly could have concluded that her training and experience provided her with sufficient knowledge to testify as an expert in the field of accident reconstruction. Accordingly, appellant's claims to the contrary must fail.

We now address appellant's claim that Trooper Ashton's opinions were based upon inadmissible hearsay evidence. In support of this claim, appellant relies upon testimony in which the trooper indicated that she obtained from a local Ford dealership the book sizes and weights of the two Fords involved in the accident for purposes of computing their relative speeds at impact.

While the opinion of an expert generally must be based upon facts which either are

admitted or established by the evidence, it is clear that expert opinions also may be based upon data not admissible into evidence if it is of a type reasonably relied upon by experts in a particular field. See Douglass v. Licciardi Construction Co., 386 Pa.Super. 292, 562 A.2d 913 (1989); Kearns by Kearns v. DeHaas, 377 Pa.Super. 200, 546 A.2d 1226 (1988); Bolus v. United Penn Bank, 363 Pa.Super. 247, 525 A.2d 1215 (1987); Commonwealth v. Haddle, 271 Pa.Super. 418, 413 A.2d 735 (1979). In the present case, it is uncontested that the published information which Trooper Ashton obtained from the Ford dealership and utilized in rendering her opinion constituted inadmissible hearsay. Thus, resolution of the issue hinges upon whether the information was of a type reasonably relied upon by experts in the field of accident reconstruction.

It is impossible for an accident reconstructionist to know the essential data

pertaining to every make and model automobile. Thus, we believe that such experts reasonably could rely upon the publications of automobile manufacturers to determine the size and weight of specific models involved in mishaps. Accordingly, as we conclude that Trooper Ashton's use of the book information in the formulation of her opinion had not impact upon the admissibility of her testimony, we decline to disturb the trial court's decision to admit it.

Appellant also asserts that the trial court erroneously permitted the Commonwealth to introduce the testimony of Robert Dearth, David Townsend, and Patrick Ballon because their testimony was cumulative to other evidence pertaining to an alcoholic odor emanating from appellant's person on the evening of the accident. However, as our examination of the record reveals that only Mr. Dearth testified regarding the existence of the odor in question, our analysis will be

limited to his testimony.

During the course of his testimony, Mr. Dearth, who is both a member of the Hiller Volunteer Fire Company and an emergency medical technician, described both the scene of the accident and the visible injuries suffered by the second driver, Gina Marie Furlong. He also indicated that he attended to Ms. Furlong until the arrival of other EMTs. In addition, Mr. Dearth testified that he walked to a Brownsville Police cruiser, where he both saw appellant and noticed an odor of alcohol on his breath. Finally, Mr. Dearth, who remained on the scene until proceeding to the landing area of an emergency helicopter, stated that appellant indicated that he was uninjured, did not wish to go to the hospital, and would not sign a release.

As we have demonstrated, Mr. Dearth's testimony, while indicating that an odor of alcohol emanated from appellant, also related

to a number of other matters. Thus, the trial court properly could have concluded that the testimony was not cumulative on the basis asserted by appellant. Accordingly, this allegation of error must fail.

Appellant's final evidentiary issue concerns the propriety of a trial court ruling which granted the Commonwealth permission to cross-examine character witnesses regarding his admission into an ARD program following an arrest for driving under the influence. As a result of this ruling, appellant declined to present evidence relating to his reputation in the community as a moral and law-abiding citizen.

Our courts long have admitted evidence indicating that an accused possess character traits inconsistent with the alleged criminal behavior for which he is on trial. See Commonwealth v. Nellom, 388 Pa.Super. 314, 565 A.2d 770 (1989). A defendant who presents character witnesses runs the same

risk attendant with the presentation of other witnesses--that of cross-examination. Id. Once a defendant utilizes character witnesses to place in issue his reputation as a moral and law-abiding citizen, the Commonwealth may cross-examine those witnesses regarding their knowledge of his prior instances of bad conduct. Although such cross-examination may relate to conduct resulting in criminal convictions, see id., it may not embrace matters involving mere arrests since the fact of an arrest is consistent with both guilt and innocence. See Commonwealth v. Scott, 496 Pa. 188, 436 A.2d 607 (1981).

In the present case, the trial court granted the Commonwealth permission to inquire into an incident which resulted in appellant's admission into an ARD program. While it is clear that admission into an ARD program generally is not equivalent to a conviction, it equally is clear that the successful completion of such a program is

not consistent with a finding of innocence. See DeNillo v. DeNillo, 369 Pa.Super. 363, 535 A.2d 200 (1987). Indeed, we note that admission into ARD may be deemed a conviction for certain purposes. See 75 Pa. C.S. Section 3731 (e) (2) (admission into ARD considered first conviction for determining proper punishment for DUI offense). Thus, contrary to appellant's claim, we find that the trial court properly granted the Commonwealth permission to conduct the cross-examination in question.

Appellant next asserts that the trial court erroneously refused him permission to present argument to the jury regarding the potential applicability of a mandatory minimum sentencing provision. However, as the question of punishment is one left to the court and may not be considered by jurors during the course of deliberations. see Commonwealth v. Waters, 334 Pa.Super. 513, 483 A.2d 855 (1984), we find that appellant's

assertion of error entitles him to no relief.

We now address appellant's assertion that the trial court improperly denied several points for charge. In Commonwealth v. Sanders, 380 Pa.Super. 78, 95, 551 A.2d 239, 247-48 (1988), we set forth the standard utilized for considering the propriety of such denials and stated:

> It is well-settled that a jury charge must be viewed as a whole to assess if it adequately guided the jury in the performance of its fact-finding duty. Commonwealth v. Rodriquez, 343 Pa.Super. 486, 495 A.2d 569 (1985). The trial court need not charge the jury pursuant to every request made of it. Id. In charging the jury the trial court's chief duty is to clarify the issues to be resolved; moreover the law must be accurately and clearly stated Commonwealth v. Newman, 323 Pa.Super. 394, 470 A.2d 976 (1984).

Relying upon these principles, we consider the various claims raised by appellant.

Appellant contends that the trial court improperly declined to charge the jury that a motorist has a right to refuse a breath test

and that such a refusal may not be considered during deliberations. In support of this contention, appellant argues that Commonwealth v. Modaffare, supra, and its companion case, Commonwealth v. Jarman, 529 Pa. 92, 601 A.2d 1229 (1992), rendered his refusal inadmissible into evidence. As we previously have demonstrated, Modaffare relates to a single sufficiency claim regarding the blood alcohol content necessary to support a DUI conviction and contains no language pertaining to the admissibility of blood test results. The same is true with Jarman. Moreover, we note that the contested instruction is contrary to 75 Pa. C.S. Section 1547 (e), which permits the jury to consider a defendant's refusal to submit to chemical testing in conjunction with other circumstances. Accordingly, appellant's claim of error must fail.

Appellant also contends that the trial court improperly declined to instruct the

jury that he could not be found guilty of homicide by vehicle if the jury determined that the death of the second driver, Gina Marie Furlong, resulted not from his actions but rather from either Ms. Furlong's failure to wear a seat belt or a defect in the roadway.[5] This contention is devoid of merit.

In instructing the jury on the offense of homicide by vehicle, the trial court noted that the Commonwealth premised its case upon appellant's violation of several provisions of the Motor Vehicle Code. In addition, the court described those provisions and stated:

> Now, in order to find the defendant guilty of vehicular homicide or homicide by vehicle, you must be satisfied that the following four elements have been proven beyond a reasonable doubt: The first element of homicide by vehicle is that the defendant drove a vehicle upon a highway in a manner that

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[5]We note that appellant raised the two matters in separate points for charge. However, for purposes of convenience, we consider them as if they originally had been part of a single proposed instruction.

> violates one of the four sections of the Vehicle Code that I just defined for you. The second element is that under the circumstances the defendant acted recklessly or with gross negligence by driving in a manner that violated any one of those four sections. The third element is that Gina Marie Furlong is dead, and the fourth element is that defendant's violation of one or more of those sections of the Vehicle Code was a direct cause of her death.

N.T., 2/4-6/92 at 222.

As a reading of the court's charge demonstrates, the charge demonstrates, the charge clearly informed the jury that appellant's actions had to be a direct cause of Ms. Furlong's death to support a conviction for homicide by vehicle. Thus, it advised the jury that appellant could not be convicted of homicide by vehicle if the jury determined that appellant's actions were not a major cause of either the accident or the resulting death. Since the trial court essentially apprised the jury of the matters at issue, and a court need not charge

pursuant to every request, we find that appellant's claim of error entitles him to no relief.

Next, appellant asserts that the trial court improperly refused a point for charge indicating that the jury must find gross negligence in order to find him guilty of homicide by vehicle. However, as our previous recitation of the court's charge indicates, the charge advised the jury of that requirement. Thus, since a trial court need not charge pursuant to every request made, appellant's claim of error must fail.

Appellant's final claim regarding the court's jury instructions concerns its denial of several points for charge relating to the presumption of innocence. Appellant asserts that the language of the instruction utilized by the court did not amply inform the jury that he was clothed with a presumption of innocence which could be overcome only by a finding of guilt by a reasonable doubt.

During the course of its charge, the trial court informed the jury of the presumption of innocence and the Commonwealth's burden of proof by stating:

> A fundamental principle of our system of criminal law is that the defendant is presumed to be innocent. The mere fact that he is arrested and charged with a crime is not evidence of his guilt.
>
> Furthermore, a defendant is presumed to remain innocent throughout the trial unless and until you conclude, based on careful and impartial consideration of the evidence, that the Commonwealth has proven him guilty beyond a reasonable doubt. This means that it is not the defendant's burden to prove that the is not guilty. Instead, it is the Commonwealth that always has the burden of proving each and every element of the crimes charged and that the defendant is guilty of those crimes beyond a reasonable doubt.
>
> A person accused of a crime is not required to present evidence or prove anything in his own defense. Under our system of law, if the evidence presented by the Commonwealth fails to meet its burden, then your verdict must be not guilty. On the other hand, if the evidence does prove beyond a reasonable doubt that the defendant is guilty of the crimes charged, then your verdict should be guilty.

> Now, although the Commonwealth has the burden of proving that the defendant is guilty, this does not mean that the Commonwealth must prove its case beyond all doubt or to a mathematical certainty, nor must the Commonwealth demonstrate the complete impossibility of innocence. A reasonable doubt is a doubt that would cause a reasonably careful and sensible person to hesitate or refrain from actin upon some matter of the highest importance in your [sic] own daily life. A reasonable doubt must fairly arise out of the evidence presented or the lack of evidence presented with respect to one of the elements of the crimes charged. A reasonable doubt must be a real doubt. It may not be an imagined one nor one manufactured to avoid carrying out an unpleasant duty.

N.T., 2/4-6/92, at 212-213.

We find that the charge set forth above, which tracks the language of Pennsylvania Standard Suggested Jury Instruction (Criminal) 7.01,[6] clearly and completely

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[6]Pennsylvania Standard Suggested Jury Instruction (Criminal) 7.01 states:

> (1) A fundamental principle in our system of criminal law is that the defendant is presumed to be innocent. The mere fact that he was arrested and accused of a crime is not any evidence against him. Furthermore, the defendant is presumed innocent throughout the trial and unless until you conclude, based

advised the jury of appellant's presumption of innocence and the Commonwealth's burden of proof. Accordingly, we find appellant's claim of error devoid of merit.

Finally, appellant, who was sentenced to a three to seven year term of imprisonment for homicide by vehicle while driving under the influence and a consecutive one to two

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on careful and impartial consideration of the evidence, that the Commonwealth has proven him guilty beyond a reasonable doubt.

(2) It is not the defendant's burden to prove that he is not guilty. Instead it is the Commonwealth that always has the burden of proving each and every element of the crime charged and that the defendant is guilty of the crime beyond a reasonable doubt. The person accused of a crime is not required to present evidence or prove anything in his own defense. . . If the Commonwealth fails to meet its burden, then your verdict must be not guilty. On the other hand, if the Commonwealth's evidence does prove beyond a reasonable doubt that the defendant is guilty, then your verdict should be guilty.

(3) Although the Commonwealth has the burden of proving that the defendant is guilty, this does not meant that the Commonwealth must prove its case beyond all doubt and to a mathematical certainty, nor must it demonstrate the complete impossibility of innocence. A reasonable doubt is a doubt that would cause a reasonably careful and sensible person to

year period of incarceration for driving while under the influence, raises several challenges to the propriety of his sentence.[7] We initially consider his assertion that 75 Pa. C.S. Section 3735 (a), which provides for the imposition of a three-year mandatory minimum sentence in cases of homicide by vehicle while driving under the influence, is unconstitutional since it removed the sentencing court's ability to exercise discretion when fashioning the appropriate

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> hesitate before acting upon a matter of importance in his own affairs. A reasonable doubt must fairly arise out of the evidence that was presented or out of the lack of evidence presented with respect to some element of the crime. A reasonable doubt must be a real doubt; it may not be an imagined one, nor may it be manufactured to avoid carrying out an unpleasant duty.
>
> (4) So, to summarize, you may not find the defendant guilty based on a mere suspicion of guilt. The Commonwealth has the burden of proving the defendant guilty beyond a reasonable doubt. If it meets that burden, the defendant is no longer presumed innocent and you should find him guilty. On the other hand, if the Commonwealth does not meet its burden, then you must find him not guilty.

[7]We note that appellant's sentence also included various other forms of punishment which we do not discuss instantly.

punishment. As we previously have upheld the constitutionality of the contested provision, we need not consider the matter further. See Commonwealth v. Kostra, 349 Pa.Super. 89, 502 A.2d 1987 (1985).[8]

Appellant also asserts that his sentence for driving while under the influence was excessive both by itself and when considered with the consecutive sentence imposed in connection with his conviction for homicide by vehicle while driving under the influence. However, we need not consider this assertion further since the Commonwealth correctly concedes that this sentence is illegal due to

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[8]Appellant also contends that the sentencing provision is unconstitutional because he was not permitted to discuss its applicability during closing argument. This contention is absurd. We are aware of no constitutional principle which grants a criminal defendant the right to argue to the jury matters regarding potential punishment. Indeed, it long has been clear that the question of a defendant's potential punishment may not be considered by the jury during deliberations. See Commonwealth v. Waters, supra. Accordingly, appellant's claim of error entitles him to no relief.

the doctrine of merger. See Commonwealth v. Voshall, 387 Pa.Super. 47, 563 A.2d 936 (1989), aff'd, 529 Pa. 571, 605 A.2d 1222 (1992) (crime of driving while under the influence merges for purposes of sentencing with homicide by vehicle while driving under the influence). In light of this concession, we vacate the judgment of sentence for the offense of driving while under the influence. Id.; see also Commonwealth v. Carbaugh, ___ Pa.Super. ___, ___ A.2d ___ (No. 01193 Pittsburgh, 1992, filed Feb. 18, 1993).

Judgment of sentence relating to conviction for driving while under the influence vacated. In all other respects, judgment sentence affirmed. Jurisdiction relinquished.

**APPENDIX "D"**

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| COMMONWEALTH, | : IN THE COURT OF COMMON |
| | : PLEAS OF FAYETTE |
| | : COUNTY, PENNSYLVANIA |
| v. | : |
| | : CRIMINAL DIVISION |
| MAX EVAN BOWSER, | : |
| | : No. 817 of 1990 |
| Defendant. | : and fractions |

**OPINION AND ORDER**

WAGNER, J.

This matter is before the Court on a Motion for New Trial and in Arrest of Judgment filed by the defendant, Max Evan Bowser, following jury verdicts on February 6, 1992. The defendant was found guilty on the charges of driving under the influence of alcohol or controlled substance;[1] homicide by vehicle;[2] homicide by vehicle while driving under the influence;[3] driving on right side

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[1] 75 Pa. C.S.A. Section 3731.

[2] 75 Pa. C.S.A. Section 3732.

[3] 75 Pa. C.S.A. Section 3735.

of the roadway;[4] meeting vehicle proceeding in opposite direction;[5] reckless driving;[6] and driving vehicle at safe speed.[7]

The defendant has alleged some eighteen reasons in support of his motion challenging the insufficiency of evidence; the admissibility of the refusal of the blood and breath test; evidentiary rulings; not allowing defense counsel to discuss the evidentiary rulings; not allowing defense counsel to discuss the mandatory incarceration for conviction of homicide by vehicle while driving under the influence during closing argument; denial of Proposed Points for Charge; denial of the Motion for Change of Venue; and denial of the Omnibus Pretrial Motion. We disagree.

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[4]75 Pa. C.S.A. Section 3301.

[5]75 Pa. C.S.A. Section 3302.

[6]75 Pa. C.S.A. Section 3714.

[7]75 Pa. C.S.A. Section 3361.

The first four issues raised by the defendant all relate to his Omnibus Pretrial Motion. Specifically, the defendant alleges that it was an error to refuse to suppress the oral statements he made to the investigating officer at the scene of the accident; that his alleged refusal to submit to a blood test at Brownsville Hospital should have been suppressed; that the complaint should have been dismissed for lack of probable cause and that his Writ of Habeas Corpus should have been granted. Each of those issues was addressed in our Opinion and Order of February 27, 1991, which we incorporate herein.

This case involves a head-on collision between two vehicles on May 10, 1990 at approximately 10:40 p.m. on the Maxwell-LaBelle Road, also known locally as the Alicia Road, in Fayette County, Pennsylvania. This road is a two lane asphalt road going generally in a north-south direction. The

center of the road is marked by a double yellow line. The speed limit is posted as 40 miles per hour. (N.T., 2/3/92 at 30).

The decedent, Gina Marie Furlong, was traveling north in a Ford Mustang. (N.T., 2/3/92 at 33). The defendant, Max Evan Bowser, was traveling south in a Ford Escort. Both cars were found entirely in the northbound lane of travel. (N.T., 2/3/92 at 30). The passenger side of the defendant's car was approximately 10 to 12 inches across the center line of the road. The vehicles met virtually head-on. (N.T., 2/3/92 at 34).

Immediately thereafter, the decedent was taken by life flight helicopter to Mercy Hospital in Pittsburgh. She was pronounced deed by Dr. Roger Barrette at 1:54 a.m. on May 11, 1990. (N.T., 2/3/92 at 9).

The defendant was found seated in the driver's seat of his car clutching the steering wheel. The passenger door was locked. (N.T., 2/3/92 at 24-28). The

defendant was given a field sobriety test by Chief Donald Eadie of the Luzerne Township Police Department. Thereafter, he was arrested at the scene and transported to the Pennsylvania State Police Barracks in Belle Vernon.

At the barracks, the defendant refused a intoxilyzer test. Next, he was taken to Brownsville General Hospital for a blood alcohol test and for treatment of injuries sustained in the accident. Again, the defendant refused the this test too.

At trial, three Commonwealth witnesses testified to the odor of alcohol on the defendant immediately after the accident. Furthermore, the Commonwealth's accident reconstruction expert testified that the defendant's vehicle was traveling between 52 and 78 miles per hour at the time of the accident. (N.T., 2/4/92 at 93).

First, we will address defendant's seventeenth and eighteenth contentions that

the court erred in not sustaining his demurrer at the conclusion of Commonwealth's case; and that the evidence was insufficient to establish that the defendant was in actual physical control of the vehicle while under the influence of alcohol or that he engaged in any conduct which was a direct cause of Gina Marie Furlong's death.

Since the defendant did not rest following this adverse ruling, but elected to present a case in defense, the correctness of this ruling on appeal can be considered only as a further challenge to the sufficiency of the evidence as a whole. Commonwealth v. Ilgenfritz, 466 Pa. 345, 353 A.2d 387 (1976); Commonwealth v. Alverado, 333 Pa. Super. 63, 481 A.2d 1223 (1984).

Where the sufficiency of the evidence is being questioned the test is: whether accepting as true all of the evidence reviewed in the light most favorable to the Commonwealth, together with all reasonable

inferences therefrom, the trier of fact could have found that each element of the offenses charged was supported by evidence and inferences sufficient in law to prove guilt beyond a reasonable doubt. Commonwealth v. Macolino, 503 Pa. 201, 205, 469 A.2d 132, 134 (1983). Furthermore, where no single bit of evidence will by itself conclusively establish guilt, the verdict will be sustained where the totality of the evidence supports the finding of guilt. Commonwealth v. Thomas, 522 Pa. 256, 267, 561 A.2d 699 (1989). We shall address defendant's sufficiency questions with this standard in mind.

Under the Vehicle Code, "any person unintentionally causes the death of another person as the direct result of a violation of section 3731 (relating to driving under the influence of alcohol or controlled substance) and who is convicted of violating section 3731 is guilty of a felony of the third

degree when the violation is the cause of death..." 75 Pa. C.S.A. Section 3735. The critical elements, therefore, are (1) that Gina Marie Furlong is dead; and (2) that the defendant unintentionally caused the death of Gina Marie Furlong as the direct result of committing the offense of driving under the influence.

Thus, the Commonwealth must also establish that the defendant was guilty of driving under the influence of alcohol. Therefore, the Commonwealth had to prove (1) that the defendant was operating a motor vehicle (2) while under the influence of alcohol to a degree that made him incapable of safe driving. Commonwealth v. Arizini, 277 Pa.Super. 27, 419 A.2d 643 (1980). In determining whether the Commonwealth proved the second element, it should be recalled that

> [t]he statute does not require that a person be drunk or severely intoxicated, but merely that the

> Commonwealth prove beyond a reasonable doubt that the alcohol had substantially impaired the defendant's normal mental and physical faculties which were essential to safe operation of a vehicle.

Commonwealth v. Horn, 395 Pa. 585, 150 A.2d 872 (1959); Arizini, supra; See Pa. Suggested Std. Crim. Jury Instructions Section 17.3731A.

Further, when a witness had arrived on the scene within a minute of a car accident and observed the defendant sitting in his car, amidst the shattered glass while intoxicated, the evidence is sufficient to show that the defendant was driving the car at the time of the accident. Commonwealth v. Deveraux, 304 Pa. 327, 450 A.2d 704 (1982); Commonwealth v. Slout, 288 Pa. Super. 471, 432 A.2d 609 (1981).

With respect to the offense of vehicular homicide, 75 Pa. C.S.A. Section 3732, the Commonwealth must prove three elements: (1) that the defendant drove in a manner which

violates the Motor Vehicle Code; (2) that the defendant knew or should have known that his conduct was in violation of the law; and (3) that the death was a probable result of the Motor Vehicle Code violation, Commonwealth v. Field, 490 Pa. 519, 417 A.2d 160 (1980); Commonwealth v. Moretti, 358 Pa. Super. 141, 516 A.2d 1222 (1986). Furthermore, the Crimes Code requires that the defendant acted recklessly or in a criminally negligent manner. Commonwealth v. Heck, 517 Pa. 192, 535 A.2d 575 (1987).

The evidence at trial established that immediately following the accident the defendant was found sitting in the driver's seat of his car clutching the steering wheel. His car was located entirely in the wrong lane of travel. At least three witnesses testified to a strong odor of alcohol and several offered their opinion that the defendant was intoxicated. The reconstruction expert placed the speed of his

car between 52 and 78 miles per hour in a 40 mile per hour zone. We find the evidence was sufficient to convict the defendant of each of the offenses beyond a reasonable doubt, therefore the defendant's contentions are meritless.

Next, the defendant's fifth and sixteenth contentions relate to the court's instructions to the jury. First, that it was an error to deny the defendant's twenty-six points for charge submitted to the court. Second, that it was error to refuse to charge the jury that they could determine a dangerous condition of the road caused the accident.

A trial court has broad discretion in phrasing its points for charge, and is not bound to give instructions in the form requested, particularly where that form does not reflect a correct interpretation of the law. Commonwealth v. Ohle, 503 Pa. 566, 470 A.2d 61 (1983), cert. denied, 474 U.S. 1083,

106 S.Ct 854, 88 L.Ed.2d 894 (1986). Moreover, the court may choose its own wording so long as the law is clearly, adequately, and accurately presented to the jury for its consideration. Commonwealth v. Prosdocimo, 525 Pa. 147, 578 A.2d 1223 (1990).

Actually, all twenty-six points for charge were not refused. The first thirteen were refused as covered by the Pennsylvania Suggested Standard Criminal Jury Instructions on reasonable doubt and presumption of innocence. (N.T., 2/5/92 at 200). The defendant's points for charge numbers 14, 16, 17, 18, 19, 20, 21, 24, and 26 all dealt with various issues involving the elements of the offenses and the definition of gross negligence. These issues were also covered by the standard jury instructions.

The defendant's point for charge number 25 was a request for instruction that criminal negligence or gross negligence was

an element of homicide by vehicle while under the influence of alcohol. We utilized the recently revised standard jury instruction.

The defendant's suggested point for charge number 15 requested an instruction that refusal to take a breath test may not be used against the defendant at trial. (N.T., 2/5/92 at 204). The defendant cited as authority for his position, Commonwealth v. Modaffare, No. 77 W.D. Apl. Dkt. (Pa. Jan. 22, 1992). We do not believe that case stands for the proposition suggested by defense counsel. (N.T., 2/5/92 at 209). We utilized the Pa. Suggested Std. Crim. Jury Instruction No. 17.1547A which permits the Commonwealth to argue that a refusal may indicate a consciousness of quilt.

The defendant's suggested points for charge numbers 22 and 23 dealt with the causal connection between the defendant's act or conduct and the cause of death. Again, the standard jury instruction which we used

covered that issue. (N.T., 2/5/92 at 209).

The defendant's sixth contention involves the denial of the Motion for Change of Venue following voir dire but prior to the jury being empaneled. The defendant argues that the pretrial publicity was of a sustained, pervasive nature. It is clear that the mere existence of pretrial publicity does not warrant a presumption of prejudice. Commonwealth v. Casper, 481 Pa. 143, 392 A.2d 287 (1978). Similarly, a possibility that prospective jurors will have formed an opinion based on news accounts will not suffice. Id.

At trial, we conducted extensive voir dire and excused for cause any juror who indicated that he or she may have read or heard anything about the case. Of the twenty-nine jurors forming the panel of prospective jurors, only seven indicated any prior knowledge. (N.T., 2/3/92 at 4). With respect to the remaining jurors, the

defendant has not alleged nor presented any evidence of actual prejudice in empaneling the jury. It was his burden to do so. Commonwealth v. Lohr, 275 Pa.Super. 212, 418 A.2d 688 (1980).

"It is not required that the jurors be totally ignorant of the facts of the case, for if this were required, given modern methods of communication, it would be impossible to empanel a jury in many cases. Rather it is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." Commonwealth v. Romeri, 504 Pa. 124, 470 A.2d 498, 503 (1983), cert. denied, 466 U.S. 942, 104 S.Ct. 1922 (1984); quoting Irvin v. Dowd, 366 U.S. 717, 722-23, 81 S.Ct. 1639, 1642-43, 6 L.Ed.2d 751 (1961).

Furthermore, the lapse of time between the incident itself and the date of trial of nearly twenty two months, makes it impossible for us to conclude that the publicity was

pervasive or that the community has been saturated with prejudicial communication where only two jurors questioned indicated that he or she had formed a fixed opinion as to the quilt or innocence of the defendant.[8] Romeri, supra. We find the jury selected to be competent and impartial, therefore we reject defendant's contention as meritless.

Next, the defendant's seventh and eight contentions involve the testimony of David Waters who was the first person to arrive at the accident scene. The defendant contends that it was error to permit David Waters to testify that he had previously traveled through the curve in which this accident occurred at sixty miles an hour. The defendant also contends that it was error to permit David Waters to state his opinion

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[8]Of the two jurors indicating that they had formed a fixed opinion as to the guilt or innocence of the defendant, one did so because they were acquainted with the family of the victim not because of pretrial publicity. (N.T., 2/3/92 at 5).

removing the victim, Gina Marie Furlong, from her burning car, he went to the defendant's car. There he found the defendant sitting in the driver's seat holding the steering wheel. The defendant would not let go of the steering wheel and had to be forcibly removed from the car. In doing so, the witness could smell an odor of alcohol. (N.T., 2/3/92 at 24-28).

After removing the defendant from the car, David Waters assisted the defendant in walking down the road to await the emergency personnel. Based upon his observations of the defendant, David Waters stated that in his opinion the defendant was intoxicated. (N.T., 2/3/92 at 43). We find that the Commonwealth laid a proper foundation for the question and that the opinion of the lay witness was admissible.

The witness further testified that he has driven this same road twice a day going to and from work for twenty-two years.

(N.T., 2/3/92 at 28). On occasion the witness indicated that he personally had traversed the curve in question at sixty miles per hour. Further, that he had done so when going in either direction.

Like, intoxication, a lay witness may give an opinion as to speed when based upon his observation and where he has had an opportunity to observe similar vehicles traveling at the same relative speed. Radogna v. Hester, 255 Pa.Super. 517, 388 A.2d 1087 (1978). Here, the witness only testified as to speed that he had traveled. He stopped short of offering an opinion as to the speed of the defendant's vehicle. We find the defendant's contentions to be without merit.

The ninth contention alleges that the testimony of three Commonwealth witnesses, Robert Dearth, David Townsend, and Pat Ballon, was repetitive and cumulative and therefore should have been limited.

Initially, we note that the trial court has discretion to determine if testimony is cumulative. Commonwealth v. Marshell, 523 Pa. 556, 568 A.2d 590 (1989). The question of whether to exclude or admit evidence is one within the discretion of the trial court. Daset Mining Corp. v. Industrial Fuels Corp., 326 Pa.Super. 14, 473 A.2d 584 (1984). The standard to be utilized is whether the probative value of the evidence substantially outweighs the danger of unfair prejudice, confusion of issues or misleading the jury. Curran v. Stradley, Ronon, Stevens & Young, 361 Pa.Super. 17, 521 451 (1987); Daset Mining Corp., supra.

In this case the three witnesses were called to testify about the accident scene when they arrived on the emergency equipment that was dispatched to the scene. (N.T., 2/3/92 at 56-82). Each also had independent testimony to offer. Robert Dearth testified he noticed an odor of alcohol on the

defendant's breath when he went to render medical assistance to the defendant at the scene. (N.T., 2/3/92 at 60-61).

David Townsend testified that he assisted in moving the defendant's car to make space for the ambulance to pass. He stated that when he did so he noticed that the defendant's car was entirely in the wrong lane of travel. He further stated that he stood on the double yellow center line of the road when he pushed the defendant's car. (N.T., 2/3/92 at 70-71).

Pat Ballon also testified and identified several photographs. Further, he offered testimony about skidmarks on the highway that led to the defendant's car. (N.T., 2/3/92 at 79-81).

Although repetitive in some respects, each of the three witnesses had relevant, probative testimony to offer. Evidence should not be excluded merely because it is damaging to the party against whom it is

offered. Whenever possible the jury should be given the entire picture from which to determine the weight to be assigned to the particular testimony. Commonwealth v. Rigler, 488 Pa. 441, 412 A.2d 846 (1980), cert. denied, 451 U.S. 1016, 101 S.Ct. 3004, 69 L.Ed.2d 387 (1981). Accordingly, we find the defendant's contention to be without merit.

The defendant's tenth and eleventh contentions involve the testimony of Trooper Brian Burden. The defendant contends that the Trooper should not have been permitted to testify that the defendant was intoxicated; and that the Commonwealth should not have been permitted to offer testimony of his alleged refusal to submit to a breath test at the Belle Vernon State Police Barracks.

We have previously discussed the law of Pennsylvania with respect to lay witnesses expressing opinions as to intoxication. Trooper Burden's opinion is based on his

observations of the defendant at the Belle Vernon State Police Barracks. Trooper Burden is a certified intoxilyzer operator. (N.T., 2/4/92 at 51). He saw the defendant at approximately ten minutes after midnight. The accident occurred at approximately 10:10 p.m. (N.T., 2/4/92 at 52). The trooper advised the defendant of the implied consent law. (N.T., 2/4/92 at 54). The trooper also detected an odor of alcohol, a stuporous, blank stare and mumbling speech. (N.T., 2/4/92 at 54-55). The trooper testified that in his opinion the defendant was under the influence of alcohol. (N.T., 2/4/92 at 60).

The refusal was based upon the defendant's failure adequately supply a breath sample for the intoxilyzer machine. According to Trooper Burden, the defendant would blow some air into the machine but not enough to cause the machine to activate. After the third warning, Trooper Burden told the defendant he would record the test as a

refusal. (N.T., 2/4/92 at 55-57).

In our Opinion on the defendant's Omnibus Pretrial Motion we discussed the request to suppress the refusal to submit to a test of breath or blood. We incorporate that discussion into this Opinion: ". . . Neither the Fourth or Fifth Amendments prevents the admission into evidence of the test results or of the refusal . . . A driver has no constitutional right to refuse and no right to have evidence either of the test results or the refusal excluded . . ." Commonwealth v. Hipp, 380 Pa.Super. 345, 551 A.2d 1086 (1988). As stated previously herein, the defendant's reliance on Modaffare is misplaced. We find the defendant's contentions to be without merit.

The defendant's twelfth and thirteenth contentions involve the testimony of Trooper Beverly Ashton. The defendant contends she should no have been permitted to testify as an accident reconstruction expert. He also

objects to her use of hearsay information that she received in her investigation concerning the size and weight of the vehicles involved in the accident. That information was utilized by the trooper to formulate her opinion.

The determination of whether a witness is qualified to offer an expert opinion on a particular subject is a matter addressed to the sound discretion of the trial court. Commonwealth v. Pearsall, 368 Pa.Super. 327, 534 A.2d 106 (1987), alloc. denied, 568 A.2d 1246 (1989). A liberal standard is utilized in making a determination as to whether a witness is qualified to testify as an expert and to render an opinion. Our Supreme Court in Kuisis v. Baldwin-Lima-Hamilton Corp., 457 Pa. 321, 319 A.2d 914 (1974) has stated the test as:

> "If a witness has any reasonable pretension to specialized knowledge on the subject under investigation he may testify, and the weight to be given to his evidence is for the jury."

An expert's pretension to specialized knowledge may be based upon practical, occupational, or other experiential training; the expert need not have gained expertise through academic training. Pearsall, supra.

Trooper Ashton's qualifications includes a bachelor's degree in criminology, basic state police training, an advanced accident investigation course, accident reconstruction school, special problems in accident reconstruction course, membership in the National Association of Professional Accident Reconstruction specialists, and previous testimony in coroner's inquests as an expert. (N.T., 2/4/92 at 66-70). We find that her academic and experiential training were clearly more than sufficient to cloak her with a "reasonable pretension to specialized knowledge," specifically in the field of accident reconstruction.

During her testimony Trooper Ashton made reference to the exterior dimensions of the

two automobiles in question. The information concerning those dimensions and the book weight of the vehicles was obtained by her from a Ford Motor Company automobile dealer in Washington, Pennsylvania. (N.T., 2/4/92 at 90-92). That factual data is not otherwise in the record. The type and model of the two vehicles involved is in the record.

Our Superior Court has followed Fed. R. Evid. 703 and authorized the use by an expert of facts or data not in the record if the facts or data were reasonably relied upon by people in that field. Steinhauer v. Wilson, 336 Pa.Super. 155, 485 A.2d 477 (1984). Although published guidelines are not themselves admissible as substantive evidence, it does not follow that it is improper for a duly qualified expert to use accepted authorities to assist him in formulating his opinion. Douglass v. Licciardi Construction Co., 386 Pa.Super.

292, 562 A.2d 913 (1989).

No one could possibly retain all the essential data about every make and model of automobile. Accordingly, we find that it was proper for the witness to use the manufacturer's data to assist her in formulating her opinion. Thus, defendant's contention is meritless.

Next, the defendant argues in contention fourteen that the court erred in determining that the Commonwealth would be permitted to cross-examine the defendant's character witnesses concerning the defendant's prior arrest for driving under the influence of alcohol for which he was placed on and completed an Accelerated Rehabilitative Disposition (ARD) Program. (N.T., 2/5/92 at 158-160). The defendant intended to offer testimony about the defendant's good character in the community as a peaceful, law abiding, sober person.

Once character has been put at issue the

Commonwealth has the right to cross-examine the character witnesses about specific instances of bad conduct by the accused. Commonwealth v. Scott, 496 Pa. 188, 436 A.2d 607 (1981); Commonwealth v. Nellom, 388 Pa.Super. 314, 565 A.2d 770 (1989). The purpose of the cross-examination is to test the accuracy of the character witness' testimony to determine whether he is indeed familiar with the defendant's reputation in the community. Scott, supra.

Such cross-examination may include questions regarding a prior conviction for a crime involving the relevant character trait to rebut a defendant's claim of that a particular aspect of his character is good. Nellom, supra; Commonwealth v. Wojtczak, 342 Pa.Super. 306, 492 A.2d 1133 (1985). It is true that admission to an ARD program is not equivalent to a conviction. Commonwealth v. Knepp, 307 Pa.Super. 535, 453 A.2d 1016 (1982). However, it is equally true that ARD

is legally relevant in certain proceedings. DeNillo v. DeNillo, 369 Pa.Super. 363, 535 A.2d 200 (1987).

In this Commonwealth, disposition of charges by participation in ARD program is deemed a conviction for purposes of habitual offender status. 75 Pa.C.S.A. Section 1542(c); Department of Trans., Bureau of Traffic Safety v. Devitt, 57 Pa.Commw. 589, 427 A.2d 280 (1981), aff'd per curiam, 500 Pa. 532, 458 A.2d 939 (1983).

Specifically for the offense of driving under the influence (DUI), acceptance into ARD shall be considered a first conviction for the purpose of computing whether a subsequent conviction of a violation of this section shall be considered a second, third, fourth or subsequent conviction. 75 Pa. C.S.A. Section 3731(e)(2).

Since an arrest is equally consistent with either guilt or innocence, cross-examination of character witnesses concerning

arrests which did not result in convictions is not permitted. Scott, supra. However, a successful completion of ARD is not equivalent to a finding of innocence. DeNillo, supra; Commonwealth v. McSorley, 335 Pa.Super. 522, 485 A.2d 15 (1984), aff'd per curiam, 509 Pa. 621, 506 A.2d 895 (1986).

In the instant case, that defendant's acceptance of ARD for a DUI relates to the character trait in issue -- sobriety. Accordingly, we find that the defendant's acceptance of ARD is a prior conviction which is admissible to rebut his claim of a sober character in the community.

Finally, the defendant claims in his fifteenth contention that it was error to refuse to allow counsel to argue the penalties mandated for homicide by vehicle while under the influence. Punishment is a matter solely for the court and not for this jury to know or to consider during its deliberations. Commonwealth v. Lucier, 424

Pa. 47, 225 A.2d 890 (1967); Commonwealth v. Waters, 334 Pa.Super. 513, 483 A.2d 855 (1984), cert. denied, 471 U.S. 1137, 105 S.Ct. 2679, 86 L.Ed.2d 697 (1985). Accordingly, we find that any reference to penalties made in closing would have been improper, therefore defendant's contention is without merit.

In accordance with the foregoing, we hereby make the following:

ORDER

AND NOW, this 3rd day of April, 1992, the defendant's Motion for New Trial and in Arrest of Judgment is DISMISSED and DENIED.

The defendant is directed to appear for the imposition of sentence on Monday, April 27, 1992 at 9:30 a.m. in Courtroom No. 5, Courthouse, Uniontown, Pennsylvania.

BY THE COURT,
/s/Wagner, J.

ATTEST:
Janice Snyder

**APPENDIX "E"**

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| COMMONWEALTH, | :IN THE COURT OF COMMON<br>: PLEAS OF FAYETTE<br>: COUNTY, PENNSYLVANIA |
| v. | : |
| | : CRIMINAL DIVISION<br>: Charge: Homicide by<br>: Vehicle While<br>: Driving Under the<br>: Influence |
| MAX EVAN BOWSER, | : |
| Appellant. | : No. 817 1/7 of 1990 |

**SENTENCE**

WAGNER, J.

AND NOW, April 27, 1992, the sentence of the Court is that the defendant, Max Evan Bowser, pay the costs of prosecution, pay the sum of $30.00 to the Catastrophic Loss Benefits Continuation Fund, forfeit the sum of $10.00 for Emergency Medical Services, forfeit the sum of $1,000.00 to the Commonwealth of Pennsylvania to be divided $500.00 to Luzerne Township and $500.00 to the County of Fayette, that he make restitution if any be due and owing, that he

undergo imprisonment in a State Correctional Institution for a period of not less than three (3) years nor more than seven (7) years and that his operator's license be suspended for a period of one (1) year. This sentence shall commence and be computed at the expiration of the sentence imposed at number 817 1/2 of 1990 and be consecutive thereto. Upon release from incarceration, the defendant will be required to pay $25.00 per month during the period of his parole for the Offender's Supervision Fee.

BY THE COURT:
/s/Wagner, J.

Attest:
/s/Janice Snyder
Clerk

**APPENDIX "F"**

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| COMMONWEALTH, | : IN THE COURT OF COMMON |
| | : PLEAS OF FAYETTE |
| | : COUNTY, PENNSYLVANIA |
| v. | : |
| | : CRIMINAL DIVISION |
| | : Charge: Driving Under |
| | : the Influence |
| MAX EVAN BOWSER, | : |
| | : |
| Appellant. | : No. 817 2/7 of 1990 |

**SENTENCE**

WAGNER, J.

AND NOW, April 27, 1992, the sentence of the Court is that the defendant, Max Evan Bowser, pay the costs of prosecution, pay the sum of $50.00 to the Catastrophic Loss Benefits Continuation Fund, pay the sum of $10.00 for Emergency Medical Services, forfeit the sum of $400.00 to the Commonwealth of Pennsylvania to be divided $200.00 to Luzerne Township and $200.00 to the County of Fayette, that he make restitution if any be due and owing, participate in the Alcohol Safe Driving

School and be responsible for the fee for that participation and that the fee be paid to the Fayette County Drug and Alcohol Abuse Clinic, that he follow any CRN recommendations made by that agency for further drug and alcohol rehabilitation, and that he undergo imprisonment in a State Correctional Institution for a period of not less than one (1) year nor more than two (2) years, and that his operator's license be suspended for a period of one (1) year. This sentence shall commence and be computed from this date.

The Court Constables are directed to deliver the defendant to the Western Diagnostic Classification Center, Pittsburgh, Pa. for compliance with this sentence.

BY THE COURT:
/s/Wagner, J.

Attest:
/s/Janice Snyder
Clerk

**APPENDIX "G"**

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| COMMONWEALTH, | : IN THE COURT OF COMMON |
| | : PLEAS OF FAYETTE |
| | : COUNTY, PENNSYLVANIA |
| v. | : |
| | : CRIMINAL DIVISION |
| | : Charge: Driving Under |
| | : the Influence |
| MAX EVAN BOWSER, | : |
| | : |
| Appellant. | : No. 817 2/7 of 1990 |

**AMENDED SENTENCE**

WAGNER, J.

AND NOW, April 26, 1993, the sentence of the Court heretofore entered on April 27, 1992 at this fractional number is amended as follows: The Court will accept the guilty verdict of the jury without further imposition of penalty.

With the exception of this amendment, the sentence of April 27, 1992 shall remain in effect.

BY THE COURT:
/s/Wagner, J.

Attest:
/s/Janice Snyder
Clerk of Courts

## APPENDIX "H"

**United States Constitution:**

ARTICLE [V]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person abe subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken from public use without just compensation.

## APPENDIX "I"

**United States Constitution:**

ARTICLE [VI]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the assistance of counsel for his defense.

## APPENDIX "J"

**United States Constitution:**

ARTICLE [XIV]
Section 1

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . .

## APPENDIX "K"

Pennsylvania Motor Vehicle Code:

75 Pa. C.S.A. Section 3731. **Driving under influence of alcohol or controlled substance**

**(a) Offense defined.**--A person shall not drive, operate or be in actual physical control of the movement of any vehicle:

(1) while under the influence of alcohol to a degree which renders the person incapable of safe driving;

(2) while under the influence of any controlled substance, as defined in the act of April 14, 1972 (P.L. 233, No. 64), known as The Controlled Substance, Drug, Device and Cosmetic Act,[1] to a degree which renders the person incapable of safe driving;

(3) while under the combined influence of alcohol and any controlled substance to a degree which renders the person incapable of safe driving;

(4) while the amount of alcohol by weight in the blood of the person is 0.10% or greater; or

(5) if the amount of alcohol by weight in the blood of the person is 0.10% or greater at the time of a chemical test of a sample of the person's breath, blood or urine, which sample is:

(i) obtained within three hours after the person drove, operated or was in actual physical control of the vehicle; or

(ii) if the circumstances of the incident prevent collecting the sample within three hours, obtained within a reasonable additional time after the person drove, operated or was in actual physical control of the vehicle. . .

**(e) Penalty.--**. . .

(2) Acceptance of Accelerated Rehabilitative Disposition, an adjudication of delinquency or a consent decree under the Juvenile Act or any other form of preliminary disposition of any charge brought under this section shall be considered a first conviction for the purpose of computing whether a subsequent conviction of a violation of this section shall be considered a second, third, fourth or subsequent conviction.

## APPENDIX "L"

Pennsylvania Motor Vehicle Code:

75 Pa. C.S.A. Section 3735 - Homicide by vehicle while driving under influence

(a) **Offense defined.**--Any person who unintentionally causes the death of another person as the direct result of a violation of section 3731 (relating to driving under influence of alcohol or controlled substance) and who is convicted of violating section 3731 is guilty of a felony of the third degree when the violation is the cause of death and the sentencing court shall order the person to serve a minimum term of imprisonment of not less than three years.

(b) **Applicability of sentencing guidelines.**--The sentencing guidelines promulgated by the Pennsylvania Commission on Sentencing shall not supersede the mandatory penalty of this section.

## APPENDIX "M"

Pennsylvania Crimes Code:

18 Pa. C.S. Section 9122:

**Section 9122. Expungement. . .**

**(c) Maintenance of certain information required or authorized.**--Notwithstanding any other provision of this chapter, the prosecuting attorney and the central repository shall, and the court may, maintain a list of the names and other criminal history record information of persons whose records are required by law or court rule to be expunged where the individual has successfully completed the conditions of any pretrial or post-trial diversion or probation program. Such information shall be used solely for the purpose of determining subsequent eligibility for such programs. Criminal history record information may be expunged as provided in subsection (b)(1) and (2). Such information shall be made available to any court upon request. . .

## APPENDIX "N"

Pennsylvania Rules of Criminal Procedure:

### RULE 186. EXPUNGEMENT UPON SUCCESSFUL COMPLETION OF ARD PROGRAM

(a) When the judge orders the dismissal of the charges against the defendant, the judge shall also order the expungement of the defendant's arrest record, subject to the provisions of paragraph (b).

(b) If the attorney for the Commonwealth objects to the automatic expungement, the objection shall be filed with the judge, together with the objections to dismissal, if any, within thirty days after service of a motion for dismissal under Rule 4185, and copies of the objections shall be served on the defendant or the defendant's attorney.

(c) If the objections are filed, the judge shall hold a hearing on the objections, affording all parties an opportunity to be heard.